

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS E. PEREZ, SECRETARY OF
LABOR, UNITED STATES
DEPARTMENT OF LABOR,

Plaintiff,

v.

CLEARWATER PAPER
CORPORATION,

Defendant.

Case No. 3:13-CV-461-BLW

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

INTRODUCTION

Following a four-day bench trial, the Court directed counsel to file proposed Findings and Conclusions by April 6, 2016. Those proposals have now been filed and the case is at issue.

The Secretary claims that defendant Clearwater Paper Corporation fired Anthony Tenny because he complained to the Occupational Safety and Health Administration (OSHA) about health hazards in Clearwater's mill where he worked. Clearwater responds that Tenny was fired for insubordination unrelated to his OSHA complaint. Thus the sole issue to decide is whether Tenny was fired because he filed the OSHA complaint.

FINDINGS OF FACT

Tenny's Work History

Tenny worked at Clearwater's Lewiston mill from 2004 until he was suspended on June 21, 2010, and then fired four days later on June 25, 2010. At the mill, logs would be cut into lumber for use in the construction industry.

From 2005 until his termination, Tenny worked in the sawmill's filing room. For most of this period, including at the time of his termination, Tenny worked as a saw filer/benchman, responsible for preparing saw blades for use by the mill. The mill replaced its saw blades several times per day and the saw filers/benchmen were responsible for ensuring that new saw blades were available when the saws needed to be changed. They were also responsible for changing the saws and performing maintenance on the saws and other equipment.

Tenny's direct supervisor was Guy Ciechanowski. Ciechanowski's supervisor was Ron Schmittle, and he in turn reported to Dana Schmitz, Clearwater's Mill Manager. Schmitz was the highest ranking manager at the mill.

Tenny's work as a saw filer was essential to keeping the mill running, and thus he and other saw filers often worked overtime before and after the start of each shift. Sometimes this overtime would be scheduled in advance. Often, however, an issue would arise during a shift that would require one or more of the saw filers to stay past the end of the shift in order to keep the mill running or ensure the mill would be ready for the next shift. In such situations, filers were expected to continue working past the end of the shift

until the necessary work was completed and would notify their supervisor after the work was finished that they had worked overtime. Prior to Tenny's suspension and termination in June of 2010, there is no evidence that any filing room employee was disciplined for working overtime without requesting advance permission.

During his tenure at the sawmill, Tenny earned several promotions and received only positive performance evaluations. Prior to his suspension and termination in June of 2010, Clearwater had never disciplined Tenny in any way. He was known as a skilled and meticulous employee.

Clearwater's Progressive Discipline System

Clearwater had a progressive discipline policy as part of a formal agreement with the union covering the workers. *See Exhibit 1005*. Under the policy, management was required to proceed through progressively more intensive efforts to correct an employee's behavior, starting with counseling, and moving on from there to (1) a verbal warning, (2) a written warning, (3) a final warning, and – only as the last step in the process – (4) termination of employment. *Id.* But that agreement also contained exceptions for “gross misconduct” such as “insubordination,” “theft,” and “sabotage.” *Id.* If any of the exceptions applied, Clearwater “may jump to any of the progressive steps of discipline, depending on severity.” *Id.* In other words, if an exception applied, Clearwater could fire the employee on the spot.

Health and Safety Issues at the Sawmill

The work in any sawmill creates wood dust. Clearwater had a dust collection system designed to remove sawdust from the air. But the machinery was old and

frequently broke down. Because production had to continue, the mill often continued operating without a working system. Sometimes repairs could be completed during that shift but at other times it took days to get the system running again.

The dust was especially thick when the mill was processing western red cedar because it is drier than other types of wood. It is also extremely combustible. When the dust collection stopped functioning while the mill was processing western red cedar, workers reported difficulty breathing, low visibility, and dangerously slick surfaces.

Tenny's Complaints About Red Cedar Dust

In April and May of 2010, the mill processed western red cedar when the dust collection system was frequently inoperable. Between 2009 and 2011, the two highest months of red cedar production at the mill were April and May 2010.

On multiple occasions in April and May of 2010, Tenny complained to his supervisor Guy Ciechanowski about the hazards posed by western red cedar dust, specifically indicating that he believed the problem posed a safety and health hazard. Ciechanowski disagreed that the dust was a health hazard because, as he testified at trial, "I worked around it for years and I've never had any effect." *See Trial Transcript (Dkt. No. 620)* at p. 620. Ciechanowski refused to take action on Tenny's complaints.

On May 8, 2010, Tenny verbally contacted OSHA regarding his concerns about the dust. On May 19, 2010, Tenny followed that up by filing a written complaint with OSHA regarding the dust. On May 28, 2010, OSHA inspected the mill as a result of Tenny's complaint.

Subsequently, Clearwater conducted its own testing of the dust levels in the mill on a day that the dust collection system was fully operational. Clearwater's internal memorandum detailing the results of this testing was dated June 21, 2010. Clearwater transmitted this report to OSHA on June 25, 2010. No citations were issued by OSHA to Clearwater as a result of either the OSHA inspection or Clearwater's report of its own testing.

Tenny's complaint to OSHA was risky. Testimony at trial from filers Jim Jackson and Martin McLeod was that they were afraid of retaliation from Clearwater for filing OSHA complaints. Their fears were realistic. Maintenance Supervisor Steve Schaller testified that on three different occasions between 2008 and 2009, Schmittle said that he would fire anyone who complained to OSHA. *See Trial Transcript (Dkt. No. 80)* at p. 36.¹

Events of June 18, 2010

On June 18, 2010, Schmittle and Richard Rosholt, Human Resources Director, met with Tenny to discuss a recent conflict between Tenny and Ciechanowski. Tenny recorded the meeting and a transcript of that recording was admitted into evidence. *See Joint Exhibit 18.*

The conflict that precipitated the meeting began with a trivial matter between Tenny and his supervisor that escalated into an angry confrontation out of proportion to

¹ Schmittle denies making any such statements, but the Court finds that he is not credible for reasons discussed below.

its beginnings. This was not the first time for either man – they had a history of tension between them. Ciechanowski was – according to Schmitz – a “little bit of an autocratic type of guy” who “had some issues” with “communications.” *See Trial Transcript (Dkt. No. 84)* at p. 667. Tenny could be a self-righteous annoyance, sensitive to every perceived slight, critical of management, insistent in his complaints, and overly agitated when ignored. Obviously, their personalities did not mesh. Tenny would whine, Ciechanowski would provoke, and their interaction would deteriorate into name-calling. At the same time, while Tenny could not get along with Ciechanowski, Tenny was displaying outstanding skills as a filer.

All of this is on display in the forty-four page transcript of the meeting held on June 18, 2010. While the transcript shows that Schmittle complimented Tenny’s work performance, he also told Tenny that “you get upset because you’re a very emotional person. I need you to just try and walk away if you can.” *Id.* at p. 24. Tenny responded that “I get pushed to a point where anybody is going to be a little bit emotional.” *Id.* But the testimony at trial showed that Tenny was more than “a little bit” emotional, and he often failed to temper his reactions like “anybody” would. Even in this meeting, Tenny got off track and threatened to file a grievance over an unrelated matter. *Id.* at pp. 22-23.

But the meeting eventually ended in an uneasy truce. Schmittle urged Tenny to come and discuss problems with him before getting into any more confrontations with Ciechanowski. He also asked Tenny to facilitate communications between management and the filers, and Tenny agreed to do so.

In closing, the discussion turned to an entirely new subject – a test of new saws that night. According to the transcript, Schmittle told Tenny that the plan for that night’s swing shift was to run a new type of saw known as a split-gauge saw. *See Transcript of June 18, 2010 Meeting (joint exhibit 18)* (wherein Schmittle tells Tenny “I’m asking Guy [Ciechanowski] and those guys to go to split-gauge saws tonight”).

Tenny was not the only filer who was told by management that the split-gauge saws would be run that Friday night. Joe Rybicki, a filer on the swing shift, testified that he called Ciechanowski earlier that same day and was told the swing shift would run the split-gauge saws that night (Friday night). *See Trial Transcript (Dkt. No. 81)* at p. 249. Ciechanowski denies telling Rybicki any such thing, but the phone records show that Rybicki did make a call to Ciechanowski just before Ciechanowski went into the supervisors’ meeting described below – in other words *just before* Ciechanowski went into the meeting and heard Schmittle change his mind and decide to run the new saws on Monday. *See Exhibit 2056*. The Court finds Rybicki’s account credible.

Tenny left his meeting with Schmittle, and both he and Rybicki told the swing shift filers that they would be running split-gauge saws that night.

Meeting of Supervisors

As Tenny was leaving Schmittle’s office, waiting outside were plant supervisors scheduled to have their regular meeting with Schmittle. At that meeting Schmittle changed his mind about the split-gauge saws and decided to hold off running them until Monday.

Schmittle's change of plans created a very obvious potential for confusion: There were now two employees (Tenny & Rybicki) who had been told the wrong plan, and a supervisor (Erdman) who knew nothing. Tenny had been told by Schmittle that the new saws would be run that night, and had been asked to facilitate communications with the filers. Even though Tenny's shift was over, Schmittle had to assume that Tenny, on his way out, would pass along this plan to the filers and Erdman.

At trial, Schmittle explained that Tenny had told him he was going home and thus he assumed Tenny would not pass along this misinformation to the swing shift filers. But that assumption makes no sense. Having directed Tenny to facilitate communications, Schmittle had to assume that Tenny would – on his way out of the mill – pass along the wrong plan to the filers and Erdman.

Rybicki also had been told the wrong plan (by Ciechanowski) and so he also needed to be corrected. Finally, the swing shift supervisor Randy Erdman – the only member of management on site during the swing shift – was not at the supervisors' meeting, and so needed to be informed of the new plan to prevent any confusion.²

Schmittle had created this potential for confusion. He and his management team now had about an hour before the swing shift began to make the necessary corrections to avoid confusion.

² Clearwater points out that Erdman did not supervise the filers, but that does not explain why Erdman was not notified of the decision to wait until Monday to run the new saws. Two filers had been told the wrong plan. Erdman was the only member of management on site during the swing shift, and as such, was the one man – the gate-keeper so to speak – who could dispel the swirl of misinformation management had disseminated.

Instead, Schmittle left the mill without talking to anyone. He never called Erdman as he had promised to do at the supervisors' meeting, and never corrected his instruction to Tenny. He did direct Ciechanowski to tell the swing shift filers about the change in plans, and Ciechanowski did tell two filers but not Rybicki and not Erdman.³ Moreover, Ciechanowski saw Tenny still at the mill but said nothing to him, because Schmittle had failed to tell Ciechanowski what he had told Tenny.

Schmittle's failure to communicate left Tenny and Erdman in the dark about the new plans. Before the split-gauge saws were run, Tenny met with Erdman and told him that "Ron [Schmittle] told me in a meeting I just had with him a few minutes ago that they were going to run the split-gauge saws tonight." *See Exhibit 1027*. Erdman responded, "There's no reason not to run them tonight," to which Tenny replied, "Well, they're [the split-gauge saws] out there." *Id.*

At no time did Tenny direct or order Erdman to run the split-gauge saws. Instead, he simply relayed Schmittle's decision to Erdman that the split-gauge saws were to be run that night. *See Exhibit 1027*. Erdman confirmed this when he testified that he recalled Tenny telling him that "*Schmittle said* that the saws were to be run that night." *Trial Transcript (Dkt. No. 82)* at p. 430 (emphasis added).

³ Erdman recalled that filers Joe Rybicki and Jim Jackson had come to him just prior to the swing shift and "said that [Ciechanowski] said they were not to run the new saws till Mon." *See Joint Exhibit 7*. But Rybicki and Jackson both testified that nobody from management told them not to run the split-gauge saws. *See Trial Transcript (Dkt. No. 81)* at p. 270 (Rybicki's testimony that "nobody refuted" Ciechanowski's earlier direction to run the split-gauge saws Friday night); *Trial Transcript (Dkt. No. 81)* at p. 294 (Jackson's testimony that Ciechanowski did not speak to him that night). The Court accepts the testimony of Rybicki and Jackson on this point.

It is true that Tenny did not tell Erdman that Schmittle had told him that he (Schmittle) wanted to be there for the running of the saws. But that was because Schmittle had left the mill and was not available anyway.

The split gauge saws ran that night without incident. Running the saws did not disrupt production in any way or cause any damage to the mill.

After returning home on that Friday evening, Tenny wrote an email to Dick Rosholt, Clearwater's Human Resource Manager, explaining that Schmittle had told him that the split-gauge saws were to be run that night but failed to tell the filers or Erdman. *See Exhibit 1003*. Tenny wrote that he tried to contact Schmittle that evening but could not find him, and that to facilitate Schmittle's plan, he had staged the split-gauge saws and notified Erdman of Schmittle's decision to run the saws that night. *Id.* Rosholt forwarded the email to Schmittle who copied Schmitz on the email. *See Joint Exhibit 17*.

June 21st – Early Morning Meeting Between Schmitz & Schmittle

The following Monday morning – June 21st at 7:00 am – Schmittle met with Schmitz. By that time, Schmitz had Tenny's email explaining how Schmittle had told him (Tenny) that the new saws would be run Friday night. And Schmittle confirmed this to Schmitz. *See Trial Transcript (Dkt. No. 81)* at p. 341 (wherein Schmitz testified that Schmittle told him on June 21st during the morning meeting that he had told Tenny on June 18th that they would run the split-gauge saws that night, June 18th). Indeed, Schmittle testified that "everything that was talked and discussed about was discussed with Mr. Schmitz. *He had every bit of information on his plate.*" *See Trial Transcript (Dkt. No. 82)* at p. 393 (emphasis added).

Taking Schmittle at his word, Schmitz and Schmittle knew (1) Tenny had been misinformed and was never told about the change in plans; (2) Schmittle had directed Tenny to facilitate communications between management and the filers, making it highly likely that Tenny would pass along Schmittle's misinformation to the filers before leaving the mill; and (3) Schmittle failed to inform Erdman of the new plan to run the split-gauge saws on Monday.

So it should have been patently obvious to Schmittle and Schmitz that Tenny's conduct was the result of Schmittle's failure to communicate. Yet Schmitz and Schmittle ask the Court to believe that they concluded from these same facts that, in the words of Schmitz, Tenny was "taking the role of being a supervisor on his own and redirecting a work team," and hence guilty of insubordination. *See Trial Transcript (Dkt. No. 84)* at p. 705.

That conclusion is preposterous. It was Schmittle, not Tenny, who was to blame, and Schmitz and Schmittle had all the facts that led unerringly to that conclusion. To conclude otherwise, and blame Tenny, means either that Schmittle and Schmitz are irrational – which they are not – or that their account is a fabrication, a pretext designed to hide their real reason for firing Tenny. That their account is pretextual looks even more likely when events later that day are examined.

June 21st – Schmittle's Statement to Tenny

Later that same day, Tenny was walking past Schmittle who was standing outside his office. As Tenny walked past, Schmittle stated to Tenny, "I know you filed the OSHA complaint." *See Trial Transcript (Dkt. No. 80)* at p. 88. This statement did not

come out the blue – Schmittle had been similarly suspicious of Tenny a year or two earlier regarding a different incident. During a meeting in 2008 or 2009 between Schmittle and Steve Schaller, the two discussed rumors that an employee had filed an OSHA complaint. Schaller recalls that Schmittle commented that he suspected “Tenny had possibly done it, and also he suspected a couple of the guys on the maintenance crew.” *Id.* at pp. 35-37.

Schmittle denies telling Tenny he suspected him of filing the OSHA complaint, and denies suspecting Tenny at all. But Schmittle lost credibility when it was revealed that he knowingly made a false accusation against Tenny. And he lost further credibility when he tried to explain away his false accusation to the Court. These matters concerning the false accusation and his explanation will be discussed further below. It is enough to say here, that the Court cannot find Schmittle credible when he denies making this statement to Tenny regarding his suspicion that Tenny filed the OSHA complaint.

June 21st – Meeting To Suspend Tenny

After meeting with Schmitz on the morning of June 21st, Schmittle met later that afternoon with Tenny and two other men – George Earle (Clearwater’s Maintenance Supervisor) and a union steward. Earle was present because Schmittle had asked him to take notes, and so Earle was listening carefully so that his written account of the meeting would be accurate. In his notes, Earle paraphrases some parts of the discussion, but at other times quotes directly from Schmittle’s statements. In one of those direct quotes,

Earle recalls Schmittle telling Tenny that “the last thing you were told was that the saws wouldn’t be used until Monday,” and that “I told you that myself.” *See Exhibit 1004*.

That accusation was entirely false. And Schmittle knew it – just a few hours earlier he had accurately recounted the facts to Schmitz. When confronted with this by the Court, Schmittle explained that he was simply mistaken in his accusation against Tenny, and did not realize his mistake until he later reviewed the transcript of the recording of the June 18th meeting. *See Trial Transcript (Dkt. No. 82) at p. 412*. But that explanation is specious – just a few hours before meeting with Tenny and making the false accusation, Schmittle had accurately recounted the facts to Schmitz. So in addition to making a false accusation against Tenny, Schmittle made a false statement to the Court. The effect of this is twofold: (1) Schmittle loses all credibility with the Court; (2) Schmittle has now created the appearance that he is hiding something, specifically that he is hiding the real reason for Tenny’s termination.

As this June 21st meeting progressed, Tenny became understandably upset with Schmittle’s false accusation. Schmittle responded by telling Tenny that he was suspended. Schmittle also sent him for drug testing – ostensibly because Schmittle perceived that Tenny acted irrationally in response to the accusations and suspension. Tenny took and passed the drug test.

On June 21st, after he was suspended, Tenny received an email from Scott Emmert, a vendor and consultant who worked closely with sawmill employees, including filers. Tenny considered Emmert to be a friend. In the email, which was primarily personal in nature, Emmert wrote “Guy [Ciechanowski] has mentioned briefly that you

have been very unhappy with things lately. But he has not elaborated about any of the particulars to me. What is going on??”

In response, Tenny complained at length about Schmittle’s false accusation. Emmert forwarded Tenny’s email to Schmittle. At the time, Clearwater had no policy that prohibited employees from communicating with outside consultants. In the past, Emmert communicated with several filers, none of whom were disciplined for talking to him.

June 25th – Tenny’s Termination

Four days later, on June 25, 2010, Mr. Tenny was terminated. The decision to terminate Mr. Tenny was made by plant manager Dana Schmitz, with substantial input from Schmittle and Rosholt. According to Clearwater’s personnel action form documenting the termination, Tenny was terminated for four reasons: (1) insubordination, for “redirecting” the night shift crew to use the split-gauge saws on the evening of June 18; (2) working 2.5 hours of “unauthorized overtime” after his shift ended on June 18; (3) being “disruptive to the workforce” by instructing an employee to run the split gauge saws, and making unfounded claims of entrapment against his supervisor; and (4) “engaging third party vendors [Emmert] into company personnel matters.”

Evaluation of Stated Reasons for Termination

The Court has already found preposterous the conclusion that Tenny was insubordinate for “redirecting” the night shift crew. The other three stated reasons do not justify immediate termination under the union agreement. *See Exhibit 1005*. Moreover, Tenny’s claim that he was being set up, as discussed, was not unfounded, and the stated

reasons regarding overtime and vendor contact were not proscribed by any rule and had never been used to discipline employees in the past. While Tenny's email to Emmert did air "dirty laundry" about Schmittle's false accusation, Schmittle's "dirty hands" in knowingly making the false accusation makes it very difficult for Clearwater to self-righteously denounce the email. Examined in light of all the evidence, the four stated reasons for Tenny's termination are pretextual.

Evaluation of Additional Reason Advanced by Schmitz at Trial

At trial, Schmitz proposed another reason. He explained that his "insubordination" rationale was not based entirely on the split-gauge saw incident but was instead based on numerous incidents over time where Tenny showed disrespect for management:

It's still the totality of the record. What I was looking for: Was there a possibility to salvage this relationship? And my conclusion was pretty easy to make; that no, there was not. He didn't like authority. And in my mind, it was never going to get any better. He was always going to continue to challenge that because he always had. Did it with the union, did it with Guy, did it with Ron. Not only with that, but he also was derogatory about some of the employees didn't have the right skills in the filing room. To me, when you look at the totality of that, I believe and I still believe today that was not going to change with [Tenny].

See Trial Transcript (Dkt. No. 84) at pp. 702-03. But there are strong reasons to be skeptical of this rationale. First, Schmitz failed to include it in his stated reasons, which limit the insubordination and disruption accusations to the split-gauge saw incident. Second, there is no record of long-term insubordination: Tenny had never been subjected to discipline or even negative evaluations. If insubordination is such a critical flaw that it justifies being fired on the spot, it stands to reason that Tenny would have at least been

disciplined or written up for past incidents of insubordination or disrespect for management. But that never happened.

It is true that Tenny was a high maintenance mix of emotional outbursts and outstanding work skills, but these are just the sort of entangled characteristics that progressive discipline was designed to unravel and straighten out. That Schmitz did not subject Tenny to progressive discipline signals that Tenny was fired for some reason other than his confrontational attitude and annoying self-righteousness.

Tenny was Fired for Filing an OSHA Complaint

The Court therefore finds that all of the reasons advanced by Clearwater for firing Tenny – the four stated reasons and Schmitz’s elaboration during trial – are a fabrication intended to hide the real reason for Tenny’s termination. The Court further finds that the real reason Tenny was fired was because he filed an OSHA complaint. Schmittle had threatened to fire anyone who filed an OSHA complaint. He suspected that Tenny had filed the OSHA complaint, and he had significant input into Schmitz’s decision to fire Tenny. Tenny was fired less than a month after OSHA inspected the Clearwater mill, an inspection based on Tenny’s complaint, and just four days after Schmittle returned to work after a three week absence. For all of these reasons, the Court finds that Tenny was fired for filing an OSHA complaint.

Sale of the Mill

In November of 2011, Clearwater sold the mill to Idaho Forest Group as part of an asset sale, at which time it terminated all of the mill’s hourly bargaining unit employees.

If Tenny had still been working at Clearwater at this time, he would have been terminated because of this sale.

CONCLUSIONS OF LAW

Jurisdiction

Section 11(c) of OSHA states that “[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint . . . related to this chapter” *See* 29 U.S.C. § 660(c)(1). It is uncontested that Clearwater is a “person” subject to the Act, and that Tenny was an employee entitled to the Act’s protections. *See* 29 U.S.C. §§ 652(4)-(6).

Elements

As the Supreme Court explained, under Section 11(c) of the Act, “[a]n employer ‘discriminates’ against an employee . . . when he treats that employee less favorably than he treats others similarly situated.” *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 19 (1980). To prevail on a claim under § 11(c), the Secretary must show: (1) protected activity by an employee; (2) subsequent adverse action taken by a person against the employee; and (3) a causal connection between the employee’s protected activity and the adverse action. *Perez v. U.S. Postal Service*, 76 F.Supp.3d 1168, 1183 (W.D. Wash. Feb. 13, 2015). Evidence establishing each element may be direct or circumstantial. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003).

At the trial stage, the Secretary bears the ultimate burden of proof “to show by a preponderance of the evidence that the challenged employment decision was ‘because of’ discrimination.” *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 856–57 (9th Cir.2002) (en

banc). If the Secretary proves his case in chief, he prevails if the finder of fact determines that discriminatory animus is the sole cause for the challenged employment actions. *Id.* at 856. The employer may defend by showing that it possessed a legitimate, non-discriminatory reason for taking the adverse actions against the complaining employee. *Id.* Where the employer has articulated mixed motives for taking the adverse actions, the employer may avoid liability only by proving that the employment decisions at issue would have been the same even if discrimination had played no role. *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1564–65 (9th Cir.1994); *Costa*, 299 F.3d at 856–57. The burden is on the employer to make this showing as an affirmative defense. *Lam*, 40 F.3d at 1564–65.

Protected Activities

Tenny engaged in protected activity when he filed the anonymous OSHA complaint regarding wood dust on May 19, 2010. *See Exhibit 1002; see also* 29 U.S.C. § 660(c)(1); 29 C.F.R. § 1977.9.

Adverse Actions

Adverse actions include all actions that might “have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006). Clearwater subjected Tenny to adverse actions when it suspended him on June 21, 2010, and terminated him on June 25, 2010.

Causation

Tenny must establish a causal connection between his protected activity and the adverse action such that the Court could “reasonably infer” that the adverse action occurred in response to the protected activity. *Kimbrow v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir.1989). Causation is established where the protected activity was a substantial reason for the adverse employment action. *See* 29 C.F.R. § 1977.6. Accordingly, “the employee’s engagement in protected activity need not be the sole consideration behind discharge or other adverse action.” *Id.* at § 1977.6(b)

Evidence of causation may be direct or circumstantial. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (circumstantial evidence shows causation where the evidence “give[s] rise to an inference of unlawful discrimination.”). One type of circumstantial evidence giving rise to such an inference is temporal proximity between the protected activity and adverse action. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002). Circumstantial evidence may also include evidence the employer knew or suspected that the employee engaged in protected activity. *See Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361, 365-67 (employer suspicion that employee made a complaint to OSHA supports a finding of causation). A plaintiff may also establish causation by showing that the defendant’s proffered reasons(s) for the adverse action are merely pretextual. *Id.* at 365. Pretext can be demonstrated by showing that “unlawful discrimination more likely than not motivated the employer” or “showing that the employer’s proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable.” *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1112-1113 (9th Cir. 2011).

Here, there is both direct and circumstantial evidence of causation. The direct evidence consists of testimony, discussed above, that Schmittle planned to fire anyone who made an OSHA complaint. While Schmittle did not make the final decision to fire Tenny he had substantial influence with Dana Schmitz who made the decision. “Where, as here, the person who exhibited discriminatory animus influenced or participated in the decision-making process, a reasonable factfinder could conclude that the animus affected the employment decision.” *See Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027, 1039-40 (9th Cir. 2005). Moreover, the circumstantial evidence supporting causation includes the Court’s factual findings that Clearwater’s stated reasons for firing Tenny are pretextual, the firing was close in time to the OSHA inspection, and Clearwater suspected that Tenny had filed the OSHA complaint. Accordingly, the Secretary has established a causal connection between Tenny’s protected activity and Clearwater’s decision to terminate him.

Clearwater Failed to Meet Its Burden

Finally, the Court finds that Clearwater failed to show that it would have taken any of the adverse actions against Tenny in the absence of his protected activity. At most, Clearwater would have run Tenny through the progressive discipline system, but would not have fired him.

Remedy

Section 11(c) provides for the recovery of compensatory and exemplary damages. The Court may “order all appropriate relief” including back pay. 29 U.S.C. § 660(c)(2).

“[A]ll appropriate relief” includes the full range of civil remedies traditionally available to courts, including compensatory and exemplary or punitive damages. *Perez v. U.S. Postal Service*, 76 F.Supp.3d 1168, 1193 (awarding lost wages, medical expenses, travel and housing expenses, and emotional distress damages incurred as a result of the unlawful retaliation, with prejudgment interest).

Remedy – Economic Damages

Tenny is entitled to economic damages in the amount of \$108,138.07. This includes \$76,613.26 in back pay he would have accrued before the sawmill was sold to the Idaho Forest Group on November 28, 2011, as well as other expenses he would not have incurred had he been employed at Clearwater until the sawmill sale. It also includes the severance pay and WARN Act payment he would have received when the mill was sold in 2011. In computing this sum, the Court adopts the calculations set forth at page 31 of the Secretary’s proposed Findings and Conclusions (Dkt. No. 89), as there were no objections to those calculations by Clearwater.

Remedy – Emotional Distress Damages

In addition to the economic damages Tenny suffered, he endured emotional distress as a result of Clearwater’s actions. Being fired based on a false accusation was humiliating and took a toll on Tenny’s closest relationships, including his intimate relations with his wife and his overall marriage relationship. *See Trial Transcript (Dkt. No.80)* at pp. 102-03. Tenny took several prescriptions to deal with these issues. *See Exhibit 1006*. Tenny was unable to find employment for over a year after his termination, despite applying for over one hundred positions, and he was left in a

financial hole he is “still digging out of...to this day.” *See Trial Transcript, supra*, at p. 103, 111-112.

The Secretary seeks an award of \$100,000 for emotional distress. While the testimony established that Tenny suffered from emotional distress caused by his termination, the sum sought is not supported. The Court finds that a more appropriate award would be \$50,000 in emotional distress damages.

Remedy – Punitive Damages

Punitive or exemplary damages may be awarded in § 11(c) cases to compensate the complainant for harm suffered and deter future violations. *See Cambridgeport Air Systems*, 26 F.3d at 1195 (1st Cir.1994). In *Cambridgeport*, the court awarded punitive damages against an employer who fired an employee for complaining about health and safety violations, and fired a second employee for being friends with the complaining employee. The district court awarded both employees their back pay, and then doubled it because the employer had fired them to chill other employees from reporting safety violations. *Id.* at 1194-95. The court concluded, after a lengthy discussion, that punitive damages were allowed under § 11(c).

The Court is not bound by *Cambridgeport* but finds it persuasive in the absence of any contrary authority in the Ninth Circuit. Based on the findings of fact set forth above, the Court finds that Clearwater fired Tenny to chill the reporting of safety violations. To deter future misconduct, the Court finds that Clearwater should be liable for punitive damages. Consequently, the Court will award as punitive damages the sum of \$76,613.26, essentially doubling his back pay award discussed above.

Remedy – Injunction

This Court has “jurisdiction, for cause shown to restrain violations” of § 11(c). 29 U.S.C. § 660(c)(2). The scope of injunctive relief must be tailored to “provide complete relief” to the plaintiff. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). “In determining the scope of an injunction, a district court has broad latitude, and it must balance the equities between the parties and give due regard to the public interest.” *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1020 (9th Cir. 2009). Moreover, “an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit – even if it is not a class action – if such breadth is necessary to give prevailing parties the relief to which they are entitled.” *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). Section 11(c) exists to protect whistleblowers and support the purpose of the Act, namely creating a safe and healthy working environment. 29 U.S.C.A. § 651(b).

Embracing this principle, courts have granted broad permanent injunctions against employers who have violated Section 11(c). *See e.g. Marshall v. Wallace*, 1978 WL 18639 at *5 (M.D. Pa. Dec. 22, 1978) (“defendants, their officers, agents, servants and employees and those persons in active concert or participation with them, are permanently enjoined from violating the provisions of Section 11(c) of the Safety and Health Act of 1970”).

Here, the Secretary is seeking to vindicate a public right (established by Congress) for employees to be free from retaliation for seeking safe workplaces. Congress intended that these protections be construed broadly. *Whirlpool Corp.*, 593 F.2d at 722.

Accordingly, the Secretary is entitled to a permanent injunction preventing Clearwater from violating Section 11(c).

The Secretary also asks the Court to (1) require Clearwater to post a notice at all facilities nationwide stating that it will not in any manner discriminate against its employees because of engagement, whether real, perceived, or suspected, in activities protected by Section 11(c) of the Act; (2) order the distribution to each Clearwater employee nationwide of a statement of whistleblower rights, and (3) compel Clearwater to require all managers and supervisors attend OSHA-approved training on whistleblower rights.

Such broad-sweeping remedies might be appropriate if the evidence had shown a corporate-wide animus toward employees who filed OSHA complaints. But that is not the case here. At most, the evidence shows an animus at the mill level, but no evidence was introduced to show that the animus is corporate-wide. While the Court might be willing to confine the requested injunction terms to the Lewiston mill, that facility has now been sold and is no longer owned by Clearwater. For these reasons, the Court will reject this part of the proposed injunction.

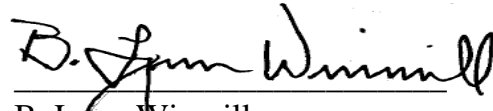
Conclusion

In conclusion, the Court finds that Tenny was fired by Clearwater for filing an OSHA complaint in violation of § 11(c). As the remedy the Court will award damages in the total sum of \$234,751.33, consisting of \$108,138.07 in economic damages; \$50,000 in punitive damages, and \$76,613.26 in punitive damages. The Court will also enjoin

Clearwater from violating § 11(c). The Court will enter a separate Judgment as required by Rule 58(a).



DATED: April 20, 2016


B. Lynn Winmill
Chief Judge
United States District Court